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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE, *et al.*,
Petitioners,

v.

THE HONORABLE JOHN C. GODBOLD,
CHIEF JUDGE OF THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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MARCH 28, 1986

QUESTIONS PRESENTED

1. Does 28 U.S.C. § 332(d)(1) constitute a grant of original and exclusive jurisdiction to the federal courts of appeals over cases arising in connection with subpoenas issued pursuant to the subpoena power conferred upon circuit councils and investigating committees by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act")?

2. Are communications between a federal judge and his law clerks and secretary and records maintained in chambers in connection with that judge's execution of the judicial office privileged from compelled disclosure to administrative committees appointed to conduct investigations pursuant to the Act?

3. Do the investigative powers and duties that the Act assigns to adminis-

trative committees within the judicial department violate the minimum conditions necessary to maintain the independence of the federal courts and the separation of powers that the Constitution mandates?

PARTIES BELOW

The petitioners in this case are the Honorable Alcee L. Hastings, a United States district judge in active service on the United States District Court for the Southern District of Florida; Betty Ann Williams, Judge Hastings's official secretary; and Alan Ehrlich, Jeffrey Miller and Daniel S. Simons, three of Judge Hastings's former law clerks. Five of the respondents are the members of a special committee (the "Committee") appointed to investigate complaints filed against Judge Hastings under the Act: the Honorable John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh

Circuit (the "Court of Appeals") and chairman of the Committee; the Honorable Gerald Bard Tjoflat and Frank M. Johnson, Jr., judges in active service on the Court of Appeals; and the Honorable Sam C. Pointer, Jr., and William C. O'Kelley, judges in active service on United States district courts within the Eleventh Circuit. Spencer K. Mercer was a party below and is a respondent here by virtue of his office as Clerk of the Court of Appeals. Because the constitutionality of the Act was called into question, the United States by the Department of Justice was permitted to intervene below and is a respondent here.

In the original proceedings in the Court of Appeals, there were six other parties. Barbara Katzen, Esq., and Joanne Tyson Colt, Esq., are attorneys who have served as law clerks in Judge Hasting's chambers and who were subpoenaed to appear

before the Committee. Initially, each challenged the Committee's right to exercise its subpoena power to compel testimony concerning in-chambers communications between a judge and his law clerks. Each subsequently, however, appeared and testified before the Committee. Joel Hirschhorn, Esq., Patricia Williams, Esq., and Jesse McCreery, Esq., have served as attorneys for Judge Hastings and were subpoenaed by the Committee. David Helman is a private investigator who was retained by Judge Hastings's attorneys. He was also subpoenaed by the Committee. Proceedings opposing and seeking enforcement of those subpoenas were docketed under the same case number as the present case in the Court of Appeals. They are still pending before that court.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE HONORABLE ALCEE L. HASTINGS, et al.,

Petitioners,

v.

THE HONORABLE JOHN C. GODBOLD, et al.,

Respondents

PETITION

United States District Judge Alcee L. Hastings and Alan Ehrlich, Jeffrey Miller, Daniel S. Simons, and Betty Ann Williams, as present and former members of the official staff serving in Judge Hastings's chambers, petition the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review a judgment and order that court entered on February 20, 1986.

OPINIONS BELOW

The opinion of the court of appeals

is reported as In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir. 1986)(Westlaw), and is set out in the appendix filed with this petition at A. 1-167. The court of appeals had consolidated original proceedings in that court with a related appeal from the district court. The district court had filed an opinion that is reported as Williams v. Mercer, 610 F.Supp. 169 (S.D. Fla. 1985), and that is set out in the appendix at A. 170-78.

JURISDICTIONAL STATEMENT

The judgment and order of the court of appeals were entered on February 20, 1986 (A. 2, 167, 179-81). The present petition was filed on March 28, 1986. The Court's jurisdiction is invoked pursuant

to 28 U.S.C. §§ 1254 (1) and 1651(a) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case arises under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604(h)(1982). The provisions of that act are set out in the appendix at A. 188-214. The court of appeals found that the provisions codified at 28 U.S.C. §§ 332(d)(1) (A.191-92) divested the district court of jurisdiction under 28 U.S.C. § 1331. The latter section is set out in the appendix at A. 215.

Resolution of the constitutional question presented would involve the following provisions of the Constitution of the United States: U.S. Const., art. I, § 1 (legislative powers), § 2, cl.5

(power of impeachment), § 3, cls. 6 and 7 (trial and judgments on impeachment), § 8, cl. 9 (inferior courts) and cl. 18 (necessary and proper); art. II, § 1, cl. 1 (executive power), § 2, cl. 2 (appointments), § 4 (impeachments); art. III, § 1 (tenure and compensation), § 2 (judicial power). Those provisions are set out in the appendix at A. 182-87.

STATEMENT OF THE CASE

The Nature of the Actions

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§331, 332, 372(c), 604(h)(1982), authorizes the chief judge of each circuit to appoint a special committee to investigate complaints questioning the conduct of any circuit or district judge serving in the circuit. 28 U.S.C. § 372(c)(4). The Act

directs each committee so appointed to "conduct an investigation as extensive as it considers necessary" and to "expeditiously file a comprehensive report thereon with the judicial council of the circuits." Id., § 372(c)(5). In conducting investigations, "the judicial council or a special committee . . ., shall have full subpoena power as provided in section 332(d) of this title." Id., § 372(c)(9)(A). Section 332(d)(1) provides in relevant part that

> Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court ....

Id. § 332(d)(1).

A special committee in the Eleventh Circuit has been investigating complaints

filed against a district judge in that circuit for three years. In May 1985, that committee exercised its subpoena power to compel the testimony and the production of official records by the judge's secretary and five lawyers who had served as his law clerks. The judge, his secretary, and his then senior law clerk filed a suit in district court challenging the constitutionality of the statutory powers the committee sought to exercise by the subpoenas and seeking protective orders to prevent violations of the judicial privilege. Thereafter, the committee filed motions directly in the court of appeals asking it to exercise original jurisdiction to enforce the subpoenas.

Both lower courts held that the court of appeals had original and exclusive jurisdiction over cases arising from the committee's exercise of the subpoena

power. The court of appeals upheld the constitutionality of the Act's provisions authorizing the committee and defining its investigative powers and duties. That court ruled that the Act overrode the judicial privilege "so long as the information sought does not on its face seem irrelevant to the investigation" (A. 165). The court entered an order enforcing the subpoenas and affirming the district court's order dismissing the complaint filed in that court (A. 166-67).

The Material Facts

In December 1981, attorneys for the Executive Branch filed an indictment alleging that United States District Judge Alcee L. Hastings conspired to obtain a bribe to influence his decision in United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981). Judge Hastings was tried and found not guilty in February 1983.

In March 1983, two district-judge members of the Judicial Council of the Eleventh Circuit (the "Council") filed a complaint (the "Complaint") against Judge Hastings under the Act. The Complaint alleged in relevant part that Judge Hastings had committed the crime of which he had just been acquitted and that Judge Hastings had "in particular cases 'completely abdicated and delegated' his decision-making authority to his law clerk." (A. 8).

In April 1983, the Honorable John C. Godbold appointed a special committee (the "Committee") to investigate the facts and allegations in the Complaint. In May 1985, the Committee directed that subpoenas be issued and served upon Betty Ann Williams, Judge Hastings's secretary; Alan Ehrlich, then Judge Hastings's senior law clerk; and Jeffrey Miller and Daniel S.

Simons, attorneys who had previously served as law clerks in Judge Hastings's chambers. Ms. Williams was commanded to appear in Atlanta on May 20, 1985, to testify before the Committee and to bring with her specified categories of documents described as "the official records of the Honorable Alcee L. Hastings, Judge, United States District Court for the Southern District of Florida" (A. 10 n.3). The present and former law clerks were commanded to appear and testify before the Committee in Atlanta the following week.

On May 13 and 14, 1985, FBI agents entered Judge Hastings's chambers and served the subpoenas on Ms. Williams and Mr. Ehrlich. Prior to the dates on which they were to appear, Ms. Williams and Mr. Ehrlich notified counsel for the Committee of their objections to the subpoenas and their intent to seek relief from their

enforcement. Neither appeared or produced documents before the Committee. FBI agents also served the subpoenas addressed to Messrs. Simons and Miller. Each of them appeared before the Committee, but asserted the judicial privilege as a basis for their refusals to answer specific questions.

Proceedings in District Court

On May 20, 1985, Judge Hastings, Ms. Williams, and Mr. Ehrlich filed a Complaint for Injunctive and Other Relief in the United States District Court for the Southern District of Florida. In that complaint, Judge Hastings asserted that in-chambers communications between a federal judge and members of his staff and records maintained by a federal judge in chambers to aid him in performing his judicial duties were privileged from compelled disclosure. He sought injunc-

tive relief to prevent the Committee from seeking to compel violations of the privilege with respect to the present and former staff members who had been subpoenaed. Ms. Williams and Mr. Ehrlich sought a declaratory judgment that the provisions of the Act conferring the subpoena power on the Committee were unconstitutional and invalid. All three plaintiffs asserted that the use of FBI agents to serve subpoenas in a federal judge's chambers in aid of a confidential administrative investigation being conducted by judicial officers violated the Act and the constitutional doctrines designed to keep separate the executive and judicial powers and asked the court to enter a judgment so declaring.

The Honorable William W. Wilkins, Jr., a judge of the United States District Court for the District of South Carolina,

was designated to hear the case. On Friday, May 24, 1985, counsel for the Committee filed and served a motion asking the court to dismiss the complaint on the ground that the court of appeals had exclusive jurisdiction over all claims asserted. The designated judge heard argument and later that day filed an order dismissing the complaint for want of subject-matter jurisdiction (A. 170-78). Plaintiffs' notice of appeal was filed immediately thereafter.[1]

Proceedings in the Court of Appeals

On May 21, 1985, the Committee filed a motion with the clerk of the court of appeals asking that court to exercise original jurisdiction and to issue an order directing Ms. Williams to show cause why she should not be held in contempt for

1. The district court subsequently filed an expanded order that was reported as the decision in the case. The appendix contains the revised order.

failing to appear before the Committee in response to the subpoena served upon her. Thereafter, the Committee filed motions seeking to compel the appearance of Ms. Williams and Mr. Ehrlich and the testimony of Messrs. Miller and Simons.

Pursuant to a second certificate of necessity, the Chief Justice designated the Chief Judge of the First Circuit and a circuit judge from the Second and from the Seventh Circuits to serve as a panel of the United States Court of Appeals for the Eleventh Circuit to hear the appeal from the district court and the original proceedings initiated by the various motions filed in the court of appeal. The special panel heard and decided the appeal

and the subpoena enforcement proceedings together.[2]

The special panel concluded that the courts of appeals had original and exclusive jurisdiction in proceedings for the enforcement of subpoenas issued pursuant to the Act (A. 16-42) and that the investigative powers assigned by the Act did not exceed the constitutional limits implicitly recognized in Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970)(A. 57-96). The panel also ruled that the Act had constitutionally authorized special committees, circuit councils, and the Judicial Conference of the United States to investigate allegations that a judge had committed 'high

2. The special panel established an expedited schedule for briefing, hearing, and argument. The panel subsequently ordered supplemental briefing in light of Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985), pet. for cert. filed, No. 85-1301 (U.S. Jan. 30, 1986).

Crimes and Misdemeanors' and to certify appropriate records and determination to the House of Representatives (A. 96-107).

Finally, the special panel found that the Act overrode a "qualified privilege" that protects a federal judge's in-chambers records and "communications concerning official judicial business" (A. 130-66). Under the Act, the panel concluded that the privilege should give way "so long as the information sought does not on its face seem irrelevant to the investigation" (A. 165). The special panel affirmed the district court's order of dismissal and entered an order directing Ms. Williams and Mr. Ehrlich to comply with the subpoenas and Messrs. Miller and Simons to "testify fully as to all pertinent matters" (A. 167).[3]

3. The panel stayed the effect of that order pending disposition of this petition.

REASONS WHY REVIEW SHOULD BE GRANTED

1. On January 30, 1986, Judge Hastings filed a petition asking the Court to review the decision in Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985); pet. for cert. filed, No. 85-1301 (U.S. Jan. 30, 1986). In that case, Judge Hastings had sought a judgment declaring the Act and the manner in which it was being applied unconstitutional. The court of appeals concluded that the comprehensive issues raised by that complaint were not ripe for adjudication, suggesting that the specific issues should be addressed in proceedings such as the subpoena enforcement proceedings that gave rise to this case. Judge Hastings asked the Court to review that decision in order to avoid piecemeal adjudication of the fundamental issues raised by the Act.

The structure of the Act, the fundamental importance of the underlying questions, and the relationship between that case and this are fully developed in the prior petition. See Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, Hastings v. Judicial Conference of the United States, No. 85-1301 (U.S. filed Jan. 30, 1986). The present petition supplements the prior petition. It presents subsidiary issues concerning the constitutionality of those portions of the Act involved in the Committee's exercise of its subpoena power against Judge Hastings's law clerks and secretary. These questions independently warrant review. Reasons compelling that conclusion are developed below. Nonetheless, petitioner submits that any disposition of the prior

petition must enhance the need for review in this case.

If review is granted in the prior case, it should also be granted here and the two cases should be considered together. This case provides an additional record that may aid the Court determining whether the underlying issues raised in Hastings v. Judicial Conference are now ripe for adjudication. See, e.g., Buckley v. Valeo, 424 U.S. 1, 114-17 (1976); Regional Rail Reorganization Act Cases, 419 U.S. 102, 122-25 (1974). Granting review here would enable the Court to consider the record below in this case as it bears on the ripeness concerns that the court of appeals thought dispositive on the record in Hastings v. Judicial Conference. So too, review in this case would be necessary to preserve the status quo pending disposition of the underlying

challenges to the Act and its application that are raised by the prior petition.

If review is denied in the prior case the need for review in this case will be enhanced in two ways. First, this case presents fundamental questions of the kind and in the concrete context that the court of appeals in Hastings v. Judicial Conference thought necessary for a proper adjudication. 770 F.2d at 1102. Second, review in this case might then be the only way to preserve these issues and to end the potential "inter-circuit shell game" that may result if the parties are required to litigate the collateral effect of the decision below upon the underlying issues that would have to be resolved before the district and circuit courts for the District of Columbia. Petition at 40-46, Hastings v. Judicial Conference, No. 85-1301.

2. The specific questions presented here merit the Court's prompt review. The investigative proceedings under the Act and the original proceedings in the court of appeals below represent dramatic departures "from the accepted and usual course of judicial proceedings" established over the past 200 years. Cf. Supreme Court Rule 17.1(a). Petitioners have found no reported decisions in which a federal judge's law clerks have been commanded to breach the confidentiality that protects in-chambers communications between a judge and his staff. No federal court of appeal has assumed original jurisdiction in a case seeking or opposing the enforcement of a subpoena issued pursuant to a power conferred upon an administrative agency. This Court has long rebuffed attempts by Congress to assign federal judges duties requiring them to conduct investigations

or to serve as commissioners submitting their determinations to officers of another branch for their review and final determination. See Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948). No federal judge has ever been compelled to endure intrusions and burdens of the kind that the court of appeals held the Act had properly authorized the Committee to impose upon Judge Hastings in this case.

Each of those departures raises questions that can only and should promptly be resolved by this Court. If the investigative powers and duties the Act assigns are unconstitutional, these and proceedings like them should not be permitted to disrupt and unsettle the

judiciary further. If those powers and duties are constitutional, then the questions raised here concerning the limits on their exercise and the manner in which they are to be enforced should be resolved in order to provide necessary guidance to those judges who must implement the Act and to those judges who become objects of the investigative powers it establishes.

3. The Court should grant review to determine whether the new investigative powers and duties assigned by the Act are consistent with the minimum conditions that the Constitution established as necessary to preserve the independence of the federal courts and to keep properly separate the powers of government. In Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), the Court recognized that the administrative powers

and responsibilities assigned to the circuit judicial councils might exceed or have exceeded the constitutional limitations mandated by the Constitution. 398 U.S. at 85-86 (Burger, C.J., for the Court); id. at 129 (Harlan, J., concurring); id. at 129-41 (Douglas, J., dissenting); id. at 141-43 (Black, J., dissenting). In Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50 (1982), the Court reiterated the need to jealously guard judicial independence. The plurality expressly noted the potential chill to the independence of bankruptcy judges that resulted from the powers circuit councils even then held as an additional reason for holding that those judges could not constitutionally exercise the judicial power of the United States. 458 U.S. at 59 n.10 ; see also id. at 89-92 (Rehnquist, J., concurring).

It was in that context that the Court emphasized the constitutional mandate to provide "institutional protections" for that independence. 458 U.S. at 60.

The Act adds significant and unprecedented investigative responsibilities and duties to the administrative powers that had been assigned the circuit councils at the time Chandler came before the Court. The present case illustrates the consequences of two of those powers. First, the Act gives the chief judge of each circuit non-reviewable discretion to appoint a committee to investigate a complaint against a federal judge. The Act provides no institutional protections for accused judges from the economic burdens or from the disruptions such an investigation must cause. In the present case, Judge Hastings has endured those burdens for three years without relief. Second,

the Act grants the councils and investigating committees the subpoena power. In the present case that power has been used to invade a federal judge's chambers and to intrude upon the confidentiality of his relationship with his law clerks and chambers secretary. As the record below and in Hastings v. Judicial Conference illustrate, the power has also been used to intrude upon his relationships with his attorneys, his friends, and his banks.

Judge Hastings did not claim in the court below and has never claimed that federal judges have or need absolute independence. The formal processes of review and the traditional writs along with informal peer pressures have long served as powerful tools to limit and confine inferior court judges in the manner in which they execute their duties and conduct themselves in office. Since the 1930's,

Congress has created administrative mechanisms to enable the judiciary to administer the business of the courts. See, eg., Chandler 398 U.S. at 96-105, 109-10 (Harlan, J., concurring)(describing legislative history and developments through 1970). During the past decade alone the provisions of the Ethics on Government Act of 1978, 28 U.S.C. App. §§ 301 et seq. (1982), and the requirements made necessary by the Speedy Trial Act of 1974, as amended, 18 U.S.C., §§ 3161 et seq. (1982), have enhanced the administrative burdens and increased the controls.

It is against that background that the true issue raised by this case may be seen: What, if any, institutional protections does the Constitution guarantee the individual federal judge from the exercise of investigative powers by his judicial colleagues? The present case does not

seek to force a retreat from the structures that had been established prior to 1980; it questions only whether the investigative powers added by the Act exceed the limitations mandated by the Constitution.

4. The specific protections found unnecessary by the court below separately establishes the need for review by this Court. The Committee seeks to compel a district judge's law clerks and secretary to testify as to all matters pertinent to an investigation as extensive as its members deem necessary. The specific allegations in the Complaint go directly to the manner in which the accused judge formulates the decisions by which he exercises the judicial power. If law clerks can be compelled to testify fully as to in-chambers communications and procedures on these questions, then there

is no privilege that protects an individual judge's decisional processes from scrutiny by his or her judicial colleagues. If the court below is correct, judges may exercise their investigative powers to obtain information that they could not permissibly obtain or consider in proceedings to review a judge's decision on appeal.

The need for this Court's intervention is illustrated by two related considerations. The decision below represents the first time that a federal court has ever had the opportunity to address directly questions concerning the existence and scope of the judicial privilege and the procedures necessary to protect it. In itself, that factor warrants the attention of this Court. Moreover, the decision below leaves the protection of the privilege under the

control of law clerks and secretaries rather than the affected judge. Judge Hastings, Mr. Ehrlich, and Ms. Williams sought protective orders prior to appearing before the Committee, under the principles established in Gravel v. United States, 408 U.S. 606 (1972) (protective order limiting scope of grand jury examination of Senator's aid to be entered before appearance and testimony). The court below ruled that Mr. Ehrlich and Ms. Williams must appear and assert the privilege before they could test the scope of the Committee's examination. Petitioners submit that the Court should consider whether these procedures provide adequate opportunity to obtain the protection necessary to maintain the confidentiality of in-chambers communications and records.

5. The Court should also grant review to consider whether the invest-

igation and reporting duties that the Act assigns to judges are consistent with the proper execution of the decisional duties that the Constitution assigns to the courts. This issue raises two concerns that were not adequately addressed in the opinion below.

First, the Act requires the chief judge of the circuit and the other judges appointed to a special committee to conduct an extensive investigation and to file a comprehensive report with the circuit council. The investigative proceedings and the resulting report are confidential. By virtue of their offices, the circuit judge members of the committee and of the council will necessarily be called upon to exercise the judicial power to review decisions made by any district judge who is investigated and remains in office. To some degree the exercise of

these powers must undermine the ability of the district courts and the courts of appeals to perform the core judicial function, deciding cases. Parties whose cases are assigned to an investigated judge may reasonably question whether they are appearing before a fearless and unbeholden adjudicator or one whose ardor has been cooled by the burdens imposed by his investigating peers. More important, parties who must defend that judge's decisions on appeal must reasonably question whether the appellate judges can review the decision impartially on the record or whether they will be influenced by information about the investigated judge's decisional practices and conduct gathered in confidential investigations and documented in confidential reports. This Court should grant review to determine whether the investigative and report-

ing duties are consistent with the requirement that the courts maintain the appearance and the reality of impartial decision-making.

Second, the Act assigns judges who serve on the committees, councils, and the judicial conference roles as legislative commissioners. They are to conduct investigations and to compile a record to determine whether a judge has engaged in conduct which might constitute grounds for impeachment. 28 U.S.C. § 372(c)(7)(B). The Conference must certify affirmative determinations and the records upon which they are based to the House of Representatives for its review. Id. § 372(c)(8). The court below saw the certification requirement as adding little to the right of any citizen to petition the House for the impeachment of a public officer. That court, however, did not consider in that

context the fact that the Act imposes a legal duty to investigate upon judges and grants them a legal power, the subpoena power, to aid them in the execution of that duty. Those are not duties imposed upon or powers held by other citizens. The Court should grant review to determine whether the Constitution permits the Act's assignment of these powers and imposition of these duties.

6. If the subpoena power is valid, the Court should exercise its supervisory jurisdiction to determine the forum in which and procedures by which such subpoenas are to be challenged and enforced. In the Act, Congress chose the administrative model suggested in Chandler, 398 U.S. at 83 n.5, 86 n.7, 88 n.10, and urged by the Judicial Conference, see, e.g., H.R. Rep. No. 1313, 96th Cong., 2d Sess. 2-5. Congress sought to separate

the councils from the courts of appeal by requiring that they be reconstituted to include district judges as members. 28 U.S.C. § 332(a)(1)(C); cf. Chandler, 398 U.S. at 83 n.5. Congress expressly provided that the Act should not be construed to alter other provisions of Title 28 of the United States Code or the federal rules of evidence and procedures. Id. § 372(c)(16) Congress expressly granted the subpoena power to the special committees, judicial councils, and the Judicial Conference, not to the courts, 28 U.S.C. § 372(c)(9). Congress expressly provided that the councils and Conference were the bodies that were authorized to issue subpoenas, not the courts of appeals or this Court. Id. §§ 332(d)(1), 331. Congress expressly assigned the clerks of the courts of appeal and of this Court ministerial roles in issuing the subpoenas and affixing the

seal of their respective courts at the direction of the chief judges or the Chief Justice. Id.

Against this backgound and in the face of a jurisprudence that has remained largely consistent since this Court's decision in Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803), the court of appeals inferred a grant of original and exclusive jurisdiction from the statutory language directing the clerk to affix the seal of the court of appeals to the subpoena. Standing alone, that holding constitutes so remarkable a departure from the accepted and usual course of judicial proceedings as to call for the exercise of the Court's power of supervision. The court should grant review to determine whether the Act requires or sanctions so dramatic a departure from the established jurisprudence in light of the consequences

that will flow from the choice of the proper forum.

The enforcement of investigative subpoenas in either the circuit or the district courts must cause some disruptions in the courts of the circuit in which the investigation takes place. But the court below failed to compare the probable disruptions in deciding whether Congress intended those proceedings to take place in the courts of appeal rather than in the distict courts. That comparison illustrates the magnitude of the problem.

Enforcement in the courts of appeals will require that the Chief Justice exercise the designation power in virtually every case. In those cases, it will require that three designated judges travel from other circuits to conduct hearings and resolve factual as well as legal issues sitting as a panel of the court of

appeals. Enforcement in those circuits leaves open the question how subpoenas served outside the issuing circuit are to be enforced. It also leaves open the question what procedural rules are to govern the proceedings in the court of appeals. It also maximizes the burdens on those who are subpoened and would oppose enforcement by forcing them to litigate in courts of appeals, courts that are often far from the districts in which they reside.

Enforcement in the district courts would, of course, involve some disruption. Judges on the court in the district in which an accused judge serves are likely to recuse themselves. That problem need not occur in the other districts. Moreover, enforcement in district courts would proceed according to known and established principles governing jurisdiction, venue,

and procedure for the enforcement of administrative subpoenas. Indeed, such enforcement procedures would be consistent with the procedure prescribed in every statute authorizing the enforcement of administrative subpoenas.

CONCLUSION

During the past four years, FBI agents, Justice Department attorneys, a grand jury, and a committee of judges and its agents have investigated the manner in which Judge Hastings formulated his decision in United States v. Romano. During the past three years, the committee of judges and its agents have expanded the investigation to probe all aspects of Judge Hastings conduct as a judge, his financial affairs, his relations with his law clerks and secretary, his lawyers, and his friends. The present case arises from the Committee's efforts to compel the

secretary and law clerks to testify to whatever matters the committee deems pertinent.

During the past four years, Judge Hastings has been continuously involved in litigation in which he sought to protect the judicial office. See, e.g., United States v. Hastings, 601 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); In re Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), aff'd., 735 F.2d 1261 (11th Cir. 1984), cert. denied 105 S.Ct. 254 (1984); Hastings v. Judicial Conference of the United States, 593 F. Supp. 1371 (D.D.C. 1984), vacated, 770 F.2d 1093 (D.C. Cir. 1985) pet. for cert. filed, No. 85-1301 (U.S. Jan. 30, 1986); Williams v. Mercer, 610 F. Supp. 169 (D. Fla. 1985), aff'd 783 F.2 1488 (11th Cir. Feb. 20, 1986)(Westlaw); In the Matter of Certain

Complaints Under Investigation, 783 F.2d 1488 (11th Cir. Feb. 20 ,1986). In each instance, he has brought his claims to this Court and asked it to resolve what all have conceded are substantial issues affecting the operation of the court and the powers of all three branches of government.

The Committee's actions have imposed substantial economic burdens on Judge Hastings and now upon his secretary and law clerks. They have interfered with his ability to discharge the duties of his office. They have disrupted the business of the district court on which he sits and of the court of appeals for the circuit in which he serves. The Committee's present actions seek to intrude to the heart of his chambers and establish that judges may no longer assume that their chambers are inviolate.

Petitioners recognize that the Court may find all that has been done to have been necessary and proper. The very length of the opinion below makes it clear that the issues raised here are fairly debatable. Petitioners submit that the importance of those issues and the need for their prompt resolution are not fairly debatable. They ask this Court to so acknowledge by granting this petition.

Respectfully submitted,

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